United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 74-1035

United States Court of Appeals

FOR THE SECOND CIRCUIT

LODGES 700, 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED AIRCRAFT CORPORATION,

Intervenor.

On Petition to Review an Order of the National Labor Relations Board

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BRIEF AND SUPPLEMENTAL APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly deferred the exercise of its unfair labor practice jurisdiction in this case pending an effort by the parties to resolve their disputes under the grievance and arbitration procedure of their collective bargaining agreement.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Lodges 700, 743, and 1746, International Association of Machinists & Aerospace Workers AFL-CIO (hereafter "the Union") to review a decision and order of the National Labor Relations Board dismissing an unfair labor practice complaint against the United Aircraft Corporation, Pratt & Whitney and Hamilton Standard Divisions (hereafter "the Company"). The Board's decision and order (A. 841-856)[1] issued on July 10, 1973, and is reported at 204 NLRB No. 133. On September 14, 1973, the Union filed a motion for reconsideration, which the Board denied on October 17, 1973 (A. 857). The Union's petition to review was filed with the Court on January 9, 1974; the Company was granted leave to intervene in this proceeding on February 1, 1974. This Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*). The underlying dispute concerns the Company's Pratt & Whitney Division plants at East Hartford and Middleton, Connecticut, and its Hamilton Standard Division plant at Windsor Locks, Connecticut. The Company is engaged in the manufacture and sale of aircraft engines, helicopters, aircraft accessories and parts, and electronic devices and components, in a manner affecting interstate commerce (A. 795; 446-447, 459).

I. FINDINGS OF FACT

The Board (Members Fanning and Jenkins dissenting) found that there is a sufficient likelihood that the parties will fairly and effectively resolve the underlying disputes in this case through their contractual grievance and arbitration procedure "to justify a temporary withholding of . . . [Board] processes" in order "to give the parties an opportunity to make their own machinery work" (A. 847-848). It, therefore, ordered

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[1] "A." references are to the printed Appendix. "S.A." references are to the Supplemental Appendix to this brief, *infra*, pp. S.A. 1-14. References preceding a semicolon are to the administrative findings; those following are to the supporting evidence.

the complaint dismissed but retained jurisdiction in accordance with its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971). The underlying proceedings and the evidence on which the Board made its findings are summarized below.

A. The Proceedings Before the Board

This case came before the Board on a series of unfair labor practice charges filed by the Union against the Company from December 1969 to February 1971 (A. 795; 442-445, 498-499). Complaint issued on the charges in February 1971 and the cases were consolidated for hearing on May 13, 1971 (A. 795; 446-460, 500-504). The complaint, as amended, alleged that the Company had violated Section 8(a)(1) of the Act by harassing union stewards and other union representatives or adherents, "[u]nder pretext of enforcing plant rules concerning employee conduct on company time and property" (A. 449-454, 457, 480, 501-502); and had violated Section 8(a)(3) and (1) by imposing disciplinary suspensions on two employees for discriminatory reasons (A. 454, 457, 481). The complaint further alleged that the Company had violated Section 8(a)(5) and (1) by failing to give the Union sufficient notice of layoffs; by refusing to furnish the Union with merit rating standards and other relevant information; by refusing, in certain instances, to provide employees with the services of a shop steward or to discuss employee grievances with the stewards; and by repudiating an agreement with a shop steward "to reconsider and re-rate" an employee's merit rating (A. 456-457, 481-483, 502-503). A hearing was held before an Administrative Law Judge in June and July 1971 (A. 794), resulting in a record of over 3,000 transcript pages and nearly 200 exhibits.

On August 20, 1971, the Board[1a] issued its decision in *Collyer Insulated Wire, supra*, 192 NLRB 837. The Board announced in *Collyer* that where a set of facts presented not only an alleged violation of the

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[1a] Members Fanning and Jenkins dissenting.

Act but also an alleged breach of the collective bargaining agreement, and the agreement contained a grievance and arbitration procedure that was likely to result in a prompt and fair resolution of the dispute, it would withhold Board processes pending resort by the parties to the contract procedure. However, the Board added that it would entertain a motion for further consideration on a proper showing that the dispute had not been promptly settled or submitted to arbitration, or that the grievance and arbitration procedure had not been fair and regular or had reached a result that was repugnant to the Act (*id.* at 843).

On April 17, 1972, the Administrative Law Judge[2] issued a decision in this case. He held that the matters alleged as unfair labor practices here should not be deferred to arbitration under the policy announced in *Collyer* because "the Company has a history of enmity to union supporters" and because he found "in this decision that the Company has further infringed upon its employees' statutory rights" (A. 796, n. 2). Accordingly, the Administrative Law Judge made findings on the merits, recommending that the Board dismiss certain allegations of the complaint and that it sustain and issue a remedial order as to others (A. 796-819).

On July 10, 1973, the Board issued its decision and order (A. 841-856). The Board concluded (by a 3-to-2 majority) that the parties' grievance and arbitration machinery offers a sufficient promise of resolving the disputes here, in a fair and sensible manner, "to justify a temporary withholding of our processes" pursuant to the policies expressed in *Collyer* (A. 847-848). Since the Board never reached the merits (A. 848), it did not pass on the Administrative Law Judge's resolution of contested factual issues nor on the conclusions he drew as to alleged violations of the Act (A. 844, n. 3). Reference is made to the Administrative Law Judge's findings here only to indicate the nature of the disputes between the parties and the posture of the case before the Board.

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[2] The title "Administrative Law Judge" replaced that of Trial Examiner effective August 19, 1972 (A. 841, n. 1).

B. The Alleged Violations of Section 8(a)(1) and (3) of the Act

1. Company supervisors and plant security personnel clash with union stewards and other employees

Evidence was adduced at the hearing of various instances in which supervisors watched employees and rated their performance at work, warned or questioned them about supposed derelictions, and directed or required them to observe plant rules (A. 796-804). The alleged violations involved a dozen employees and roughly the same number of first-level supervisors, plus several members of the plant security force (A. 844, 796-804). A recurring issue was whether the Company was merely enforcing normal plant rules and discipline during working time or whether it was harassing union stewards and adherents by applying higher or impermissibly restrictive standards to them.[3]

In many instances, the Administrative Law Judge found that the Company's conduct did not violate Section 8(a)(1). For example, he found no violation in company supervisors' reprimanding union stewards or activists Dorsey, Gleason, Williams, and Raymond for wasting time or excessive talking on the job and for various work derelictions (A. 796-799,

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[3] Under the collective bargaining agreements, the Company and the Union recognized that employees covered by the agreements "may not be discriminated against . . . because they engage in activities protected by the NLRA" and "have the right to become or remain members of the union . . . without being subject to restraint or coercion . . . because of their exercise of this right" (A. 510, 585, 608-609 at Art. IV). Grievances under these provisions were subject to binding arbitration on mutual agreement of the Company and the Union (A. 518, 593, 616, 617 at Art. VII, Sec. 3(b) and (d)). The agreements also limited the amount of paid time that shop stewards might spend in handling employee grievances or complaints on the job and the manner in which stewards were to request, and supervisors were to grant, permission to interrupt work for such activities (A. 521-522, 596, 619-620 at Art. VII, Sec. 8). A grievance that the Company had violated these provisions was subject to mandatory and binding arbitration on the request of either party (A. 517, 519, 592, 593, 616, 617 at Art. VII, Sec. 3(a) 28and (d)). Plant rules adopted pursuant to the management functions clause of the contracts authorized discipline for the improper use of working time (A. 509-510, 583-584, 607-608 at Art. I, A. 702-705, 709, 537-541).

801-802, 805). He further found that the Company did not violate Section 8(a)(1) in questioning employees Sidusky and Duhamel about another employee's complaint against a shop steward (A. 805), or in threatening to "walk" employee Labbe "out the door" if he persisted in his refusal to give plant security investigators a statement about an altercation between Shop Steward Raymond and Foreman Heim unless a union steward was present (A. 804, *infra*, p. 8). In addition, he found that no violation occurred during a quarrel between Supervisor Phelps and Steward Piorek, in which both became angry and made disparaging remarks and Phelps threatened Piorek with discipline for "another outburst like that" (A. 806).

The Administrative Law Judge recommended that complaint allegations be sustained with respect to incidents involving employees Lee, Gaskins, Havener, Raymond, and Sullivan (A. 800-801, 802-803, 804-805). Specifically, he found that Foreman Kane threatened newly elected Shop Steward Lee with stricter enforcement of work rules, thereby violating Section 8(a)(1) despite Kane's retraction of his remarks the next day (A. 804); and that Foreman Lyman, in violation of Section 8(a)(1), denied Shop Steward Gaskins the full privilege afforded other employees of engaging in short non-work related conversations during working hours (A. 799-800).[4] He also found that the Company violated Section 8(a)(1) by taking the position that Shop Stewards Gaskins and Havener were not entitled to security passes authorizing them to carry their union briefcases

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[4] However, the Administrative Law Judge found that Foreman Lyman and General Foreman Foster did not violate Section 8(a)(1) of the Act when they told Shop Steward Gaskins that by Company-Union agreement merit ratings were to be distributed only in the cafeteria and locker room (A. 800). Gaskins protested his right to distribute the ratings to employees in other departments during his lunch hour; a short time later, Foreman Lyman acknowledged that Gaskins was right and he was wrong (A. 800; 170-171, 405-407). The Union filed an exception to the Administrative Law Judge's refusal to find unlawful harassment of Gaskins in this incident (A. 837-838), and the Union's brief to this Court (p. 16) includes the incident as part of its recitation of the violations alleged in the instant proceeding.

out of the plant on a routine everyday basis, but only when their briefcases were needed, *e.g.*, for the presentation of a grievance or attending a grievance meeting (A. 800-801; 140-150, 171-174, 180-181, 403-405, 410-414, 415-417, 420-427).[5] Finally, the Administrative Law Judge found certain violations in connection with the suspensions of Gary Raymond and Robert Sullivan, discussed below.

2. The Company questions and suspends employee Gary Raymond

Shop Steward Gary Raymond was suspended for two weeks in October 1970, following a heated quarrel over his merit rating grievance, in which Raymond used abusive language to Foreman Herbert Heim and knocked a pencil out of Heim's hand (A. 802; 631, 199-200, 205-206, 263-267, 633). Raymond filed a grievance over his suspension, but the Union did not pursue it beyond Step 2 of the grievance procedure, electing instead to file a charge with the Board (A. 736-742). The Company then filed a grievance over the suspension and referred the dispute to arbitration, as it was authorized to do under the contract (A. 743-752, 587-589 at Art. VII, Sec. 1, Step 3(b), Step 4, Sec. 3(a)(1)).[6]

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[5] A plant rule provided that as part of the security inspection required of employees leaving the plant, all "outgoing packages must be accompanied by a guard's pass signed by your foreman" (A. 700, 719-720, 354-357). The Union pressed a grievance filed by Shop Steward Gaskins over application of the pass requirement to union briefcases through Step 3 of the grievance procedure, urging that the requirement as applied violated the purpose, recognition, and non-discrimination clauses of the contract (A. 579-582, 696, 158-164, 173-174, 509, 510). Grievances under these provisions could be referred to binding arbitration on mutual agreement of the Company and the Union (A. 518-519 at VII, Sec. 3(b) and (d)). Numerous passes were issued to Stewards Gaskins and Havener for carrying their union briefcases out of the plant (A. 800-801; 735, 142-150, 180, 404, 405, 414, 415-417, 428). Lockers were provided employees for storing personal articles within the plant (A. 154, 172, 180-181, 404-405, 413-414).

[6] The management functions clause of the contracts reserved to the Company the right "to discharge or otherwise discipline any employee for just cause" and "to make and apply rules and regulations for production, discipline, efficiency, and safety" (A. 583 and 607 at Art. I). On the one hand, plant rules authorized discipline

(Continued)

Before the arbitration could be scheduled (A. 752-756), the unfair labor practice case came on for hearing and the Administrative Law Judge denied the Company's motion to exclude evidence on Raymond's suspension because of the forthcoming arbitration (A. 187). After litigation of the issue in the unfair labor practice hearing, the Company agreed with the Union to withdraw its request that the grievance be arbitrated (A. 775-784). On the evidence adduced at the hearing, the Administrative Law Judge concluded that "Raymond, in handling his grievance, did not go beyond permissible limits and, accordingly, that his suspension was violative of Section 8(a)(1) and (3) of the Act" (A. 803).

The Administrative Law Judge also found a violation in the Company's questioning of Raymond, prior to his suspension, about the incident with Foreman Heim (A. 803). Raymond testified that he told plant security investigators that he would like a steward present during his questioning but would not press the issue since he knew that the charges against him were serious and that employee Labbe's job had been threatened for requesting a steward (A. 201, *supra,* p. 6). In the Administrative Law Judge's view, the failure of the investigators to reassure Raymond that he would not be punished for insisting on union representation constituted an implied threat violative of Section 8(a)(1) because Raymond, unlike Labbe, "ha[d] reasonable ground to fear that the interview . . . [would] adversely affect his continued employment, or even his working conditions . . . " (A. 803), quoting *Quality Mfg. Co.,* 195 NLRB 197, 198 (1972), enforcement denied in relevant part, 481 F.2d

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[6] (Continued) for "insubordination" (A. 704-705); on the other hand, the contracts proscribed discrimination against employees because they engaged in activities protected by the Act (A. 585, 608-609 at Art. IV). Any "grievance concerning the discharge or disciplinary suspension of an employee" was subject to mandatory, binding arbitration at the request of either party (A. 589, 593, 613, 616 at Art. VII, Sec. 3(a) 1, and (d)).

1018, 1021-1024 (C.A. 4, 1973), rev'd and enfmt. ordered, ____ U.S. ____, 88 LRRM 2698, decided Feb. 19, 1975, No. 73-765.[7]

3. The Company questions and suspends employee Robert Sullivan

Robert Sullivan, a former union officer and an active union member, was suspended for three days in July 1970 for handing merit ratings to another employee in a conversation that continued for a short time after the work buzzer sounded (A. 804; 763). As in Raymond's case, the Union dropped or withdrew a grievance concerning Sullivan's suspension prior to arbitration and filed a charge with the Board, whereupon the Company grieved over the suspension (A. 757-758).[8]

In Sullivan's case, however, the Company-filed grievance came on for hearing before an arbitrator in May 1971, after the Company had secured a court order directing the Union to submit the grievance to arbitration (A. 759). *United Aircraft Corp. v. Lodge 743, IAM,* 77 LRRM 3136 (D. Conn., 1971). The arbitrator denied the Union's motion to defer arbitration pending disposition of the unfair labor practice complaint by the Board, noting that the Union's arguments for deferral had

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[7] As noted *supra*, p. 5, the Administrative Law Judge found no violation of the Act in earlier incidents in which supervisors reprimanded Raymond for wasting time and excessive talking on the job (A. 801-802). The Union filed exceptions to the failure to sustain violations with respect to only two of these incidents: (1) Foreman Bly stared at Raymond and told him that he talked too much, and (2) Foreman Heim reprimanded Raymond for "jumping the clock" – *i.e.*, edging toward the timeclock before the luncheon buzzer sounded (A. 802, 835-836). The Union's brief to this Court cites hearsay testimony by Raymond (A. 189) to support the statement that "Other employees were told by the group supervisor not to talk to Raymond because he was the shop steward" (Un. Br. 12). No such finding was made by the Administrative Law Judge (A. 801-802) and no exception was taken to the failure to make such a finding (A. 826-839).

[8] Relevant contractual provisions are cited *supra*, pp. 7-8, n. 6. Also relevant are plant rules forbidding "failure to start work at the proper time," "distributing unauthorized . . . literature," and "interfering in any way with the work of others" (A. 709; 764).

been rejected by the courts in ordering the Union to submit to arbitration an earlier Company-filed grievance over the suspension of another steward (A. 759-762). See *United Aircraft Corp. v. Canel Lodge 700, IAM*, 436 F.2d 1 (C.A. 2, 1970), affirming 314 F. Supp. 371 (D. Conn., 1970), cert. denied, 402 U.S. 908.[9]

The arbitrator's report and award issued in September 1971. He found that Sullivan's suspension was not for just cause under the contract, although he was not convinced by the evidence that the Company was guilty of illegal discrimination under the National Labor Relations Act (A. 770-772). See *supra*, p. 5 n. 3. The arbitrator's award provided that the disciplinary suspension should be abrogated and removed from Sullivan's work record, and that he should be reimbursed for pay lost during the three days that he was suspended (A. 772).

Seven months later, in April 1972, the Administrative Law Judge issued his decision. In view of the arbitrator's award and the Company's compliance with that award, the Administrative Law Judge concluded that "an unfair labor practice finding would not add materially to the order in this case" (A. 804; 773, 793). He, therefore, deemed it "unnecessary to determine whether Sullivan was suspended for his union

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[9] The earlier grievance concerned the suspension of Steward Tobin. After this Court had affirmed the order directing the Union to submit the grievance to arbitration, the Company urged the Board to defer litigation of an unfair labor practice charge based on the same incident pending the outcome of the court-ordered arbitration. The Board denied the request to defer, in a decision antedating *Collyer*, and found that Tobin's suspension violated Section 8(a)(3) and (1) of the Act. *United Aircraft Corp.*, 188 NLRB 633, n. 1 (1971). (Referred to in the Union's brief as the "*Sherman* case," after the Administrative Law Judge). See discussion *infra*, pp. 31-32, n. 36. Thereafter, the Company apparently agreed to withdraw the dispute over Tobin's suspension from arbitration (A. 761). See also *United Aircraft Corp. v. Canel Lodge 700*, 77 LRRM 3167 (D. Conn., 1971), another case in which the Union resisted arbitration while it sought to invoke Board jurisdiction, and the District Court granted the Company's petition for an order to compel arbitration.

activity" (A. 804). However, he found that Company Security Officer Porter, in questioning Sullivan about the incident, asked if Sullivan had secured the ratings he was passing out from the Union; whether Sullivan was still active in the Union; and, if not, how he happened to have other employees' merit ratings in his possession (A. 805; 72-75, 330).[10] The Administrative Law Judge concluded that, "Evaluated against Sullivan's subsequent suspension, . . . Porter's interrogation of Sullivan about his union activity [was] violative of Section 8(a)(1) of the Act" (A. 805).

C. The Alleged Violations of Section 8(a)(5) and (1) of the Act

1. Notification of Layoffs

The Administrative Law Judge recommended that the Board dismiss the complaint allegation that the Company violated Section 8(a)(5) and (1) by failing to give the Union timely notice of its intent to lay off employees (A. 806-807). He found that the Union by contract "has conceded to the Company the right to determine unilaterally the need for a layoff and the area in which it shall be effected"; that the Union has acquiesced in the Company's notice procedure for years; and that the "notice given the Union has proved adequate to check out whether the Company has followed the seniority requirement of the contract" in selecting employees for layoff within each area (A. 807).[11] Accordingly,

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[10] A plant rule proscribed "having in possession without proper authority . . . property of the Company or of other employees" (A. 709).

[11] The contracts generally reserved to the Company the right "to lay off because of lack of work or other cause" (A. 510, 584, 608 at Art. I), and provided for the layoff and recall of employees within specified seniority areas according to seniority (A. 523-524, 528-532, 598-599, 602-606 at Art. VIII, Secs. 1(a), 2, Appendices B and C) or seniority and demonstrated ability (A. 621-622, 626-627 at Art. VIII, Secs. 1(a), 2, Appendix B). The Administrative Law Judge found that Company practice was to make a layoff list available 2 days in advance of the layoff so that the Union could check the list for compliance with contractual seniority requirements (A. 806-807). Since employees were notified on the same day as the Union, employees on earlier shifts sometimes learned of the layoff before the Union (A. 806;

(Continued)

he determined that "in the circumstances of this case," the Company's notice procedure "does not constitute a statutory violation," and that the issue whether the procedure complies with the contract is appropriately left for determination under the contractual grievance and arbitration procedures (A. 807).[12]

2. Refusals to call shop stewards

The Administrative Law Judge found a single instance in which the Company failed to call a shop steward to handle an employee's grievance in violation of Section 8(a)(5) and (1) of the Act (A. 808). Thus, he found such a violation in Assistant Foreman Kasden's failure "to summon a shop steward as required by the union contract," in connection with notifying employee Francis Rogers about an adverse work report and having it signed in her presence in February 1971 (A. 808).[13]

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[11] (Continued) 21-23). Under the contracts, the Union had 5 working days after a layoff to correct an error through the grievance procedure, and additional time if the layoff affected 300 or more employees (A. 807; 521, 523-524, 596, 598-599, 619, 621-622 at Art. VII, Sec. 6, Art. VIII, Sec. 1(c)). A grievance alleging that an employee was laid off or not recalled, in violation of the seniority provisions of the contract, was subject to mandatory and binding arbitration upon the request of either party (A. 515, 519, 589, 593, 613 at Art. VII, Sec. 3(a) 2 and (d)).

[12] The contracts required (A. 525, 599-600 at Art. VIII, Sec. 5, and A. 622 at Art. VIII, Sec. 4):

> Except in an emergency or for reasons or conditions over which the company has no control, where there are general layoffs for an indefinite period, as much notice as is practicable shall be given in writing to the [union] shop committee before the layoff. A list will be made available indicating the names of the employees to be laid off and their seniority status in relation to the remaining employees in the occupational group [or seniority area].

A grievance that the Company violated these provisions was subject to mandatory, binding arbitration upon the request of either party (A. 518-519, 592-593, 616-617 at Art. VII, Sec. 3(a) 33, (d)).

[13] Employee Rogers filed a grievance over the incident, which was processed through several steps of the grievance procedure but was not referred to arbitration (A. 697, 186). The grievance claimed a violation of Step 1 of the contractual (Continued)

The Administrative Law Judge found no violation in Foreman Norton's refusal to summon a steward, following his suspension of employee Frederick Avery in August 1970, because "the Company effectively repudiated Norton's improper refusal" by rescinding the suspension and asking if Avery still wanted a steward after Avery filed a grievance under the contract (A. 807-808). Finally, the Administrative Law Judge recommended dismissal of the complaint allegation concerning Foreman Poppalardo's refusal to summon a shop steward after he suspended employee Michele Urbanowicz in July 1969 for refusing to sign an attendance report charging her with failure to call in an absence (A. 808). Employee Urbanowicz filed a grievance over the suspension and the refusal to summon a steward, the Union submitted the unsettled grievance to arbitration, and the grievance was heard by an arbitrator in January 1970 (*infra*, S.A. 8).[14]

On May 7, 1970, the arbitrator issued his report (*infra*, S.A. 4-14). He found that the grievance over the failure to summon a steward, as well as the suspension, was arbitrable; that employee Urbanowicz was wrongfully denied the services of a steward under the contract; and that

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[13] (Continued) procedure (A. 697). Step 1 provided that "[a]n employee having . . . a grievance or complaint may, after notice to his immediate supervisor, take it up either directly with his foreman or with the shop steward who shall take it up with the employee's foreman" (A. 511, 585, 609 at Art. VII, Sec. 1, Step 1). A grievance that the Company had violated Step 1 was subject to mandatory and binding arbitration upon the request of either party (A. 517, 519, 591, 593, 615, 617 at Art. VII, Sec. 3(a)21 and (d)).

[14] The collective bargaining agreements provided that "[a]n employee who has been discharged or given a disciplinary suspension, shall before leaving the plant be permitted to see the shop steward for the area in which he worked at a location designated by the company if he requests this privilege of his foreman" (A. 523, 597-598, 621 at Art. VII, Sec. 10). A grievance that the Company violated this provision was subject to mandatory and binding arbitration, upon the request of either party (A. 517, 519, 592, 593, 616, 617 at Art. VII, Sec. 3(a)30 and (d)). As noted *supra*, any "grievance concerning the discharge or disciplinary suspension of an employee" was also subject to mandatory, binding arbitration (A. 515, 519, 589, 593, 613, 617 at Art VII, Sec. 3(a)1 and (d)).

her suspension might well have been avoided, and the dispute resolved, had a steward been summoned (*infra,* S.A. 10-11, 13-14). Accordingly, he found it unnecessary to determine whether Urbanowicz's refusal to sign the attendance report, standing alone, would have been just cause for suspension under the contract (*infra,* S.A. 12). His award directed that Urbanowicz be made whole for any and all losses suffered as a result of being denied a steward's services, including reimbursement of any pay lost during her suspension on July 23, 1969 (*infra,* S.A. 14).

The Administrative Law Judge's Decision issued in April 1972, almost 2 years after the arbitrator's. In view of the arbitral award, and "as an unfair labor practice finding based on this incident would not materially affect the order . . . in this case," the Administrative Law Judge found it unnecessary to determine whether Urbanowicz was denied the services of a shop steward in violation of Section 8(a)(5) and (1) of the Act (A. 808).

3. The merit rating system: processing of grievances and access to relevant information

The Administrative Law Judge found certain aspects of the Company's administration of its merit rating system violative of Section 8(a)(5) and (1), and recommended dismissal of the complaint as to others (A. 808-817). He found that the Company has long maintained a performance rating plan, under which employees who are meeting only normal job requirements are rated at the standard job rate, while those performing at a higher level may receive additional compensation based on ratings of above standard, premium, or top (A. 808). In 1970-1971, merit rating grievances were filed under the contract challenging the correctness of the foreman's rating and requesting, in substantially identical language, that "my foreman produce and turn over to the Steward and myself copies of all standards and records that he relied upon in making the above rating" and that "I be rerated" and placed in a higher rate range (A. 809-813; 354, 734, 400-403.

See, e.g., A. 728-730). Denials of these grievances at Steps 1 and 2 of the contract procedure provide the background for the violations alleged here (*ibid.*).[15]

a. The alleged refusal to furnish merit rating standards

The Administrative Law Judge found without merit the allegation that the Company had refused to furnish the Union the standards used by foremen for merit ratings, noting that a description of the factors used in the ratings had been furnished the Union, together with a statement of the weight accorded each factor, the scoring used to determine the rating, and sample employee performance rating sheets (A. 813, 809, 822-823; 340-343, 337, 712, 713-716, 545-549, 723-727, 364-365, 710, 536). He concluded that the foreman's ratings of individual employees on the specified factors of accuracy, output, use of working time, application of job knowledge, and cooperation were "obviously matters of observation and judgment based on job knowledge and experience" (A. 813; 35-36, 40-46, 710, 536).

b. The alleged failure to furnish records relevant to merit rating grievances

The Administrative Law Judge found no violation of the Act in the Company's failure to produce records assertedly relevant to individual employee performance at Step 1 discussions of merit rating grievances on the ground that the Union, under the contract, had agreed to defer the production of records until Step 2 of the grievance procedure

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[15] The contracts provided that the administration and operation of the merit rating system are "the functions and responsibilities solely of management" (A. 526, 600-601, 624 at Art. X, Sec. 1). Each employee was to be rated every 6 months "against the basic factors of performance indicated on the Employee Performance Rating Sheet applicable to his job" (A. 526, 601, 624 at Art. X, Sec. 2). A claim that an employee had not been properly rated could be processed as a grievance under the contract (A. 526, 601, 624 at Art. X, Sec. 4).

(A. 814). However, he held that the Company had unlawfully refused to produce certain records at Step 2, rejecting "the Company's claim that it did not violate the Step 2 provision of the contract concerning the production of records" (A. 814).[16]

c. Alleged failures to provide for discussion of merit rating grievances between the grievant's supervisor and his shop steward at Step 1 of the contract procedure

The Administrative Law Judge determined that in some instances the Company failed to provide for the discussion of employee merit rating grievances between the supervisor who made the rating and the shop steward authorized to represent the employee at Step 1 of the contract grievance procedure.[17] Thus, he found that Foreman Bankowski violated Section 8(a)(5) and (1) by refusing to discuss employee Tyaak's merit rating grievance with Shop Steward Havener on the asserted grounds that

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[16] Step 2 of the grievance procedure provided that the Company "will produce such pertinent existing production, payroll, attendance records, and disciplinary notices pertaining to the employee involved as may be necessary to the settlement of a grievance at this step of the grievance procedure" (A. 512 at Art. VII, Sec. 1, Step 2). Step 1 merely provided for discussions with the grievant's foreman, presentation of the grievance in writing if not settled orally, and a written answer by the foreman within 5 days (A. 511 at Step 1). A grievance that the Company violated Step 1 or 2 of the grievance procedure was subject to mandatory, binding arbitration on the request of either party (A. 517, 519 at Art. VII, Sec. 3(a) 21 and 22, and (d)).

[17] As shown, Step 1 of the contractual grievance procedure provided that an employee, "after notice to his immediate supervisor," could take his grievance up "either directly with his foreman or with the shop steward who shall take it up with the employee's foreman" (A. 511, 585, 609 at Art. VII, Sec. 1). Step 1 also provided that the "shop steward shall be given an opportunity to be present at the adjustment of a grievance arising under the terms of this agreement which is presented to the foreman directly by an employee; provided, however, a shop steward shall not be paid for time so spent" (A. 512). As noted, a grievance that the Company violated Step 1 was subject to mandatory, binding arbitration (A. 517, 519 at Art. VII, Sec. 3(a) 21 and (d)).

Tyaak should have discussed his rating with Bankowski first and that Havener knew nothing about toolroom work (A. 816, 809). He also found unlawful the Company's insistence that Shop Steward Lee should discuss the merit rating grievances of seven employees with Assistant Foreman Zielinski, their current supervisor, rather than with the various foremen who had previously supervised and rated the employees (A. 816, 812).[18]

D. The Contractual Grievance Procedure

The contractual grievance procedure begins with a commitment that—

> In the event . . . a difference arises between the company, the union, or any employee concerning the interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which must be followed [A. 511, 585, 609 at Art. VII, Sec. 1].

A comprehensive four-step grievance procedure followed, culminating in arbitration (A. 511-514, 515-520, 585-588, 589-594, 609-618 at Art. VII, Sec. 1, Steps 1-4, Sec. 3). The contracts listed 39 types of grievances, which if not settled at Step 4 "shall be submitted to arbitration upon the request of either party" (A. 515-518, 589-593, 613-616 at Art. VII, Sec. 3(a)). All other grievances arising under the contract if not settled at Step 4, could be referred to arbitration upon the written agreement of the Company and the Union (A. 518, 593, 616 at Art. VII, Sec. 3 (b)). The grievance and arbitration procedures were available to employees, the Union, and the Company (A. 511-519, 585-594, 609-617 at Art. VII, Secs. 1-3), and the arbitrator's decision was to be "final and conclusive and binding" (A. 519, 593, 617 at Art. VII, Sec. 3(d)).

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[18] However, the Administrative Law Judge held that Foreman Rodenbaugh properly referred Shop Steward Nellis to Assistant Foreman Terabasi for a discussion of employee Zura's merit rating grievance since Terabasi had made the rating (A. 816-817, 812-813). And he found no violation in Foreman Rodenbaugh's subsequent overruling of Assistant Foreman Terabasi's tentative decision to rerate Zura, which Rodenbaugh characterized as undeserved and a mistake after Terabasi had discussed the rerating with him (*ibid.*).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board[19] determined that the factors favoring deferral to arbitration in this case outweighed those militating against (A. 842-847). It concluded (A. 847-848):

> We are not persuaded that, if directed to do so by this Board, the parties here will not make sensible and effective use of their own procedures to resolve the kinds of disputes involved in this proceeding. While the litigious characteristics exhibited in the past by both parties cannot but create some doubt about this matter, we believe there is positive evidence of maturation of the collective-bargaining relationship. We are therefore willing to proceed on the assumption that the procedures which have been shown to work well can and will work effectively again to resolve the disputes here. At least, we think there is sufficient promise of such a result to justify a temporary withholding of our processes and to give the parties an opportunity to make their own machinery work.

The Board's order dismisses the complaint but retains jurisdiction "solely for the purpose of entertaining an appropriate and timely motion for further consideration on a proper showing either that (a) the dispute has not, with reasonable promptness after the issuance of the Decision here, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act" (A. 848-849).

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[19] Members Fanning and Jenkins dissenting (A. 850-856).

ARGUMENT

I. THE BOARD ACTED WITHIN ITS DISCRETION IN DEFERRING TO THE CONTRACT GRIEVANCE AND ARBITRATION PROCEDURE

A. The Board's Collyer Policy Is Valid

As noted, the Board in *Collyer Insulated Wire, supra,* announced a policy of deferring to contract grievance and arbitration procedures that offer "a quick and fair means" for resolving disputes arising from "the contract . . . and the parties' relationship under the contract" (192 NLRB 839). This Court first approved the *Collyer* policy in *Nabisco, Inc. v. N.L.R.B.*, 479 F.2d 770 (1973). Every other court of appeals that has since passed upon the policy has also approved it. *Associated Press v. N.L.R.B.*, 492 F.2d 662, 666-668 (C.A.D.C., 1974); *Local 2188 IBEW v. N.L.R.B., (Western Electric Co.),* 494 F.2d 1087, 1090 (C.A. D.C., 1974), cert. denied, ____ U.S. ____, 43 U.S.L.W. 3209 (No. 73-1788); *Enterprise Publishing Co. v. N.L.R.B.*, 493 F.2d 1024, 1026-1027 (C.A. 1, 1974); *Provision House Workers Union Local 274 v. N.L.R.B., (Urban Patman, Inc.),* 493 F.2d 1249 (C.A. 9, 1974), cert. denied, ____ U.S. ____, 43 U.S.L.W. 3208 (No. 73-1593). Most recently, the Supreme Court has expressed approval of *Collyer* in *Arnold Co. v. Carpenters District Council,* 417 U.S. 12, 16-17 (1974).

As these authorities recognize, the Board's decision to defer the exercise of its jurisdiction pending resort to contract dispute-resolving procedures furthers the Act's policy of encouraging "practices fundamental to the friendly adjustment of industrial disputes" and the "practice and procedure of collective bargaining." Section 1 of the Act. Moreover, the "Board's position harmonizes with Congress' articulated concern that, '[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement' . . . [Section 203(d) of the Labor Management Relations Act]."

Arnold Co. v. Carpenters District Council, supra, 417 U.S. at 17. See also *Nabisco, Inc. v. N.L.R.B., supra,* 479 F.2d at 772-773.[20]

Finally, the Board's *Collyer* policy is a logical corollary of its long-standing policy of deferring to an outstanding arbitral award where the result reached is not repugnant to the Act, the procedure followed was fair and regular, and all parties have agreed to be bound by the award. See *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955). The Board's post-award deferral policy has also received wide judicial approval. See *Carey v. Westinghouse Corp.,* 375 U.S. 261, 271 (1963); *Associated Press v. N.L.R.B., supra,* 492 F.2d at 667, and cases there cited at n. 21; *Local 2188, IBEW v. N.L.R.B., supra,* 494 F.2d at 1090 and cases there cited; *Local 715, IBEW v. N.L.R.B., (Malrite),* 494 F.2d 1136, 1137-1138 (C.A.D.C., 1974). See also *Lodge 743, IAM v. United Aircraft Corp.,* 337 F.2d 5, 11 (C.A. 2, 1964), cert. denied, 380 U.S. 908.[21]

The Union "recognize[s] that this Court has approved the *Collyer* doctrine" (Br. 62), but argues that the Court should "reconsider *Nabisco* and hold *Collyer* invalid" (Br. 63).[22] In support of its argument, the

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[20] Further support for the Board's deferral policy is found in the legislative history of the 1947 amendments to the Act, showing that Congress deleted provisions that would have made it an unfair labor practice to violate the terms of a collective bargaining agreement at the same time that it enacted Section 301 of the LMRA giving the district courts jurisdiction of suits for violation of such agreements. See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 41-42, I Leg. Hist. of the LMRA 545-546 (GPO, 1948); S. Rep. No. 105, 80th Cong., 1st Sess. 23, I Leg. Hist., *supra,* 429. See also discussion in *Nabisco, Inc. v. N.L.R.B., supra,* 479 F.2d at 773. Congress thus not only denied the Board "plenary authority to administer and enforce collective bargaining contracts," but also established arbitrators and the courts as "the principal sources of contract interpretation." *N.L.R.B. v.Strong,* 393 U.S. 357, 360-361 (1969).

[21] Prior to Collyer, the Board had deferred to contract grievance and arbitration procedures on an *ad hoc* basis, where it found that the particular circumstances warranted pre-award deferral, but its guidelines in this area were less clear than in the post-award cases. See *Collyer, supra,* 192 NLRB at 841 and cases there cited at nn. 11-13. See also *Dubo Mfg. Co.,* 142 NLRB 431 (1963).

[22] The Union's effort to deprecate the "precedential weight" of *Nabisco* on the ground that "there petitioner conceded that the Board could defer to *arbitration*" (Continued)

Union relies (Br. 60) on the intent of Congress to preserve the jurisdiction and remedial authority of the Board over unfair labor practices, while providing for concurrent judicial authority over contract claims arising under Section 301. However, it is well settled that Congress in enacting Section 10 of the Act empowered, but did not require, the Board to exercise jurisdiction.[23] Accordingly, the Board has "considerable discretion to . . . decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." *International Harvester Co.*, 138 NLRB 923, 925-926 (1962), quoted with approval in *Carey v. Westinghouse, supra,* 375 U.S. at 271, and *Nabisco v. N.L.R.B., supra,* 479 F.2d at 773. See *Local 2188 IBEW v. N.L.R.B., supra,* 494 F.2d at 1090. See also *United Aircraft Corp. v. Canel Lodge 700, IAM,* 436 F.2d 1, 3-4 (C.A. 2, 1970), cert. denied, 402 U.S. 908; *Lodge 743, IAM v. United Aircraft Corp., supra,* 337 F.2d at 11.

The Union's reliance (Br. 51-53, 61-62) on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), is similarly misplaced. That case holds that an employee who claims to have been discharged for racially discriminatory reasons is not barred from suing his employer in federal district

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[22] (Continued) (Br. 62) is without merit. In rejecting petitioner's contention that "the Board should defer only when the dispute settlement technique adopted by the parties involves mandatory arbitration" (479 F.2d at 773), the Court in *Nabisco* considered and approved the Board's *Collyer* policy on the merits – as the Union acknowledges in urging the Court to reverse *Nabisco* (Br. 63).

[23] The Board's discretionary authority not to proceed on individual unfair labor practice charges was established long before *Collyer.* See *N.L.R.B. v. Indiana & Michigan Electric,* 318 U.S. 9, 18-19 (1943); *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-265 (1940); *Guss v. Utah Labor Relations Board,* 353 U.S. 1, 3, 13 (dissenting opinion of Mr. Justice Burton) (1957); *Haleston Drug Stores v. N.L.R.B.*, 187 F.2d 418, 421-422 (C.A. 9, 1951), cert. denied, 342 U.S. 815. Nonetheless, the Board recognized in *Collyer* that the exercise of its discretion to defer to arbitration in appropriate cases "compels an accommodation between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other hand, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." 192 NLRB at 841.

court, under Title VII of the Civil Rights Act of 1964, simply because an arbitrator has previously determined that the discharge was for "just cause" under the collective bargaining agreement. The Court also rejected the employer's alternative contention that "even if a preclusion rule is not adopted," federal courts should adopt a deferral rule on Title VII claims "analogous to the NLRB's policy of deferring to arbitral decisions on statutory issues in certain cases [citing *Spielberg, supra*]." 415 U.S. at 55-56, and n. 17. The Union's attempt to extrapolate the *Gardner-Denver* holding into a rejection of the Board's *Collyer* policy (Br. 61-62) is negated by the express approval given *Collyer* in the Supreme Court's subsequent *Arnold* decision, *supra.*

In any event, the statutory scheme underlying *Gardner-Denver* is readily distinguishable from that which underlies *Collyer.* Thus, Title VII of the Civil Rights Act "concerns not majoritarian processes, but an individual's right to equal employment opportunities"; its "strictures are absolute and represent a congressional command that each employee be free from discriminatory practices"; and it gives private suits a primary role in vindicating the rights conferred. *Alexander v. Gardner-Denver, supra,* 415 U.S. at 51, 45 and cases there cited. By contrast, as shown *supra,* the Board under the National Labor Relations Act is enjoined to encourage collectively-bargained solutions for industrial disputes; it is empowered but not required to exercise its jurisdiction; and it has discretionary authority to withhold its processes in individual cases when to do so will promote the public policies that the Board was created to serve.

B. The Collyer Policy Was Properly Applied Here

Among the factors cited by the Board in support of its decision to defer in *Collyer* were the long and productive bargaining relationship of the parties and the lack of any claim of employer enmity to employees' exercise of protected rights (192 NLRB 842). The Board reaffirmed the relevance of these factors in applying its deferral policy in this case (A.

842-843). However, the Board emphasized that the ultimate question is "whether the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly" (A. 843), and that the answer to that question depends on a balance of all relevant factors (*ibid.*).

In the Board's view, the violations that the Union seeks to establish on the present record do not "reflect a pattern of continuation of prior unfair labor practices found against this [Company]" (A. 845); nor do they demonstrate "anti-union animus such that deferral to arbitration would be a futile gesture." *Local 2188 IBEW v. N.L.R.B., supra,* 494 F.2d at 1091. Thus, the Board does not share the Union's perception that the misconduct alleged here "rends the fabric of the collective bargaining relationship" (Br. 39), and reveals an employer bent on defeating the purposes of the Act (Br. 29-33). Rather, the Board found that the asserted acts of harassment and coercion "are minor indeed," given their limited nature and the relatively small number of employees and low-level supervisors involved, out of a workforce of thousands (A. 844-845). And it declined to conclude that evidence of such "occasional first-level supervisory misconduct" establishes "a disinclination on the part of . . . [the Company] to accept the reality of collective representation or to honor its contractual commitments dealing with procedures for dispute resolution" (A. 845).

Contrary to the Union's suggestion (Br. 34-37), the issue at this stage is not whether the Company could be charged with the acts of its supervisors in a determination on the merits. Instead, the Board's focus was on the comparatively isolated and marginal nature of the violations alleged as bearing on the prospects for satisfactory dispute settlement through the contract grievance and arbitration procedure. It was from this perspective, that the Board found "the combination of past and presently alleged misconduct" insufficient "to rebut the reasonableness of our fundamental assumption that the parties' own procedures will effectively resolve the current disputes in a prompt and fair manner" (A. 843-844).

The Board added (A. 846-847):

> Being keenly aware of the limited resources of this Agency, we are not particularly desirous of inviting any labor organization, particularly one representing employees in so large a context as this, to bypass their own procedures and to seek adjudication by this Board of the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors relating to merit ratings and other matters. Fortunately, most labor organizations under such circumstances do not come to us with such problems and instead voluntarily resolve them with the employers under their contracts. When a labor organization seeks instead to have us resolve each such dispute, we think it proper to require it, before invoking our services, initially to invoke the available voluntary machinery.

Although "the litigious characteristics exhibited in the past by both parties cannot but create some doubt about this matter,"[24] the Board found "positive evidence of maturation of the collective-bargaining relationship" in the successful processing of grievances over two of the three employee suspensions involved here, and in the Company's compliance with arbitral awards remedying those suspensions (A. 847-848, 845). The Union deprecates the significance of these facts on the grounds that the Company was merely demonstrating a preference for arbitral rather than Board resolution of such disputes and that it had little choice but to comply with the awards when it lost before the arbitrator (Br. 37-39). Again, the Union mistakes the issue, for the fact of successful resolution of some of the disputes through the contractual procedure supports the likelihood that the remaining disputes can be similarly resolved, whatever the Company's

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[24] See, e.g., *Local Lodges 743 and 1746, IAM v. N.L.R.B.*, and *N.L.R.B. v. United Aircraft Corp.*, Nos. 72-1935 and 72-2310, pending before this Court on the Union's petition to review and the Board's application for enforcement in 192 NLRB 382; *Lodges 743 and 1746, IAM v. United Aircraft Corp.*, Nos. 72-1936, 72-1937, and 72-2072, pending before this Court on the Union's appeals and the Company's cross-appeal from an order of the district court under Section 301.

motive for cooperating in that resolution.[25] Moreover, the Board has expressly retained jurisdiction should there be any lack of cooperation in promptly settling or submitting the remaining disputes to arbitration or should the contract procedures prove unfair or reach a result that is repugnant to the Act.[26] See *Gary-Hobart Water Corp.*, 210 NLRB No. 87 (1974), 86 LRRM 1210, 1211, enfd. ____ F.2d ____ (C.A. 7, 1975), 88 LRRM 2830, No. 74-1483, Feb. 21, 1975; *Medical Manors, d/b/a Community Convalescent Hospital*, 206 NLRB No. 124 (1973), 84 LRRM 1421, 1422; *Radio Television Technical School, Inc., t/a Ryder Technical Institute v. N.L.R.B.*, 488 F.2d 457, 461 (C.A. 3, 1973).

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[25] Nor is there merit to the Union's argument that since non-compliance with an arbitral award is not fatal to post-award deferral under *Spielberg*, compliance is irrelevant to pre-award deferral under *Collyer* (Br. 37-38, n. 38). See *Local 715 IBEW v. N.L.R.B., (Malrite), supra*, 494 F.2d at 1139 and n. 5.

[26] The Union argues that the Board erred in failing to determine that the result reached in the already-completed arbitration proceedings is repugnant to the Act because the remedy prescribed for the suspensions of Sullivan and Urbanowicz was insufficient to effectuate the statutory aims (Br. 59-60). Sullivan's award provided that his suspension should be abrogated and removed from his work record and that he should be reimbursed for any pay lost during his 3-day suspension in 1970 (*supra*, p. 10). Urbanowicz's award provided that she should be made whole for any and all losses suffered as a result of being denied the services of a shop steward, including reimbursement of any pay lost during her part-day suspension in 1969 (*supra*, p. 14). On these facts, the Board reasonably concluded that the contract machinery "has already effectively resolved . . . [these] disputed suspensions" (A. 848). See *Local 715 IBEW v. N.L.R.B., (Malrite), supra*, 494 F.2d at 1137-1138. However, since only the Sullivan and Urbanowicz suspensions have been submitted to arbitration, the Board recognized that "we cannot now inquire whether resolution of the [entire] dispute will comport with the standards set forth in *Spielberg Manufacturing Company*" (A. 848). The Union is, therefore, free to raise its claim of statutory repugnancy in the context of the total litigation after further arbitral proceedings are completed. And any disposition made by the Board at that time would also be subject to judicial review. Compare *Local 715 IBEW v. N.L.R.B., (Malrite), supra*, and *Associated Press v. N.L.R.B., supra*, 492 F.2d at 667, with *Radio Television Technical School, Inc. t/a Ryder Technical Institute v. N.L.R.B.*, 488 F.2d 457, 461 (C.A. 3, 1973). Contrary to the Union's further suggestion (Br. 59), the Board did not *"sub silentio"* overrule the Administrative Law Judge's finding concerning interrogation of Sullivan (*supra*, p. 11). That issue, like all unresolved issues, has been deferred to the contract grievance and arbitration procedure.

There may appear to be some "irony" in deferring to an arbitrator "in the name of 'promptness' " (Un. Br. 44) disputes about events occurring between 1969 and 1971, after a full-scale administrative hearing on the merits, (*supra*, p. 3). But the Board's reference in *Collyer* to "a quick and fair means" for resolving disputes under the contract presupposes prompt resort to those procedures. The deferral policy is designed to encourage voluntary settlement of disputes through agreed-upon procedures without the necessity for invoking the more cumbersome and time-consuming procedures of the Board, followed by court review. To the extent that the policy is successful, it will strengthen the bargaining relationship between the parties, generally provide faster relief for employees, and permit the Board and the courts to devote more and prompt attention to those cases that cannot be settled through the contract procedure and must go to litigation under the Act. Accordingly, the courts of appeals have uniformly approved the Board's decision to defer to contract grievance and arbitration procedures under *Collyer*, despite the lapse of time resulting from initial resort to the Board and subsequent court review.[27]

Moreover, the history of the present litigation, the miscellaneous nature of the charges, the size of the record, and the intricacy of the factual questions about the relationship of the parties under the contract all underline the desirability of settling such issues when they arise under the contract procedure, rather than collecting disputes over a 2-year period and making them the subject of an overblown administrative

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[27] See *Nabisco, Inc. v. N.L.R.B., supra,* 479 F.2d at 772 (charges filed in 1969; deferral approved in 1973); *Enterprise Publishing Co. v. N.L.R.B., supra,* 493 F.2d at 1025 (charges filed in 1971; deferral approved in 1974); *Associated Press v. N.L.R.B., supra,* 492 F.2d at 665, approving 199 NLRB 1110, 1112 (charges filed in 1970; deferral approved in 1974); *Local 2188 IBEW v. N.L.R.B., (Western Electric Co.), supra,* 494 F.2d at 1088, approving 199 NLRB 326, 327 and 344 (charges filed in 1970 and 1971; deferral approved in 1974); *Provision House Workers Union, Local 274 v. N.L.R.B., (Urban Patman, Inc.), supra,* 493 F.2d at 1249, approving 197 NLRB 1222, 1223 (charges filed in 1971; deferral approved in 1974).

and judicial proceeding. As the district court commented in ordering the Union to submit a Company-filed grievance over an employee's suspension to arbitration (*United Aircraft Corp. v. Canel Lodge No. 700 IAM, supra,* 314 F. Supp. at 377):

> It is a commonly accepted precept that labor-management frictions and misunderstandings should be recognized and treated early in their origin. It is then that problems are of manageable size and subject to remedial measures with a minimal harm and scarring to the participants.

Thus, "arbitration is often a catalyst in labor peace because of its speed." *United Steelworkers v. American Int'l Aluminum Corp.*, 334 F.2d 147, 153 n. 11 (C.A. 5, 1964), cert. denied, 379 U.S. 991.

Far from suggesting that the arbitrator must adopt Board procedures or entertain non-contract statutory claims (Un. Br. 55-57), the Board has determined that disposition of contract issues through the arbitral process may provide a more "efficient, inexpensive, and expeditious means for dispute resolution" in this case (*Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 58.[28] At least, the Board judged that there was a "sufficient promise" of fair and quick settlement through the contract procedure "to justify a temporary withholding of our processes and to give the parties an opportunity to make their own machinery work" (A. 847-848). We show below that the Board's judgment was reasonable.

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[28] Thus, in the Board's view, the disputes involved here can be settled through the parties' agreed-upon procedure and do not require all the "rights and procedures common to civil trials" (Un. Br. 57), nor invocation of "the General Counsel's broad investigatory authority and resources" (Un. Br. 57-58 n. 58). In any event, the Board has retained jurisdiction to guard against procedural unfairness in the arbitral process and the Union has already had the benefit of administrative procedures as an information-gathering resource in this case.

C. The Parties' Disputes May Appropriately Be Resolved Under the Contract Procedures

1. The alleged Section 8(a)(1) and (3) violations were properly deferred

In *National Radio Co.*, 198 NLRB No. 1 (1972), 80 LRRM 1718, 1722-1724, the Board[29] first extended its pre-award deferral policy to a claim of antiunion discrimination, in violation of Section 8(a)(3) and (1).[30] The Board recognized that the request to defer in such a case does not rest on "any presumed primacy of an arbitrator to interpret an ambiguous or contested contract provision " (80 LRRM at 1722). Rather, "[a]bstention is urged on the straightforward basis that the contract prohibits discipline for other than 'just cause' and provides a mechanism for the quick and fair vindication of employee rights when that clause is violated" (*ibid.*). The Board held that the crucial determinant for deferral in such circumstances is the reasonableness of the assumption that arbitration will resolve the dispute in a manner consistent with the standards of *Spielberg* – *i.e.*, that the resolution will be procedurally fair and not repugnant to the Act (*id.* at 1723).

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[29] Members Fanning and Jenkins dissenting.

[30] *Collyer* involved a charge of unilateral action in violation of Section 8(a)(5), to which the defense was raised that the action was authorized by the collective bargaining agreement and the course of dealing between the parties. 192 NLRB at 837. Court decisions approving pre-award deferral have involved not only alleged breaches of the bargaining obligation as in *Collyer* – see *Local 2188, IBEW v. N.L.R.B. (Western Electric), supra,* 494 F.2d 1087, 1089; *Provision House Workers Union v. N.L.R.B. (Urban Patman), supra,* 493 F.2d at 1249, approving deferral in 197 NLRB 1222, 1223 – but other alleged violations as well – see *Nabisco, Inc. v. N.L.R.B.*, 479 F.2d at 772 (Section 8(b)(2) and (1)(A) charges, as well as 8(b)(3)); *Enterprise Publishing Co. v. N.L.R.B., supra,* 493 F.2d at 1025, 1026 (Section 8(b)(2) and (1)(A) charges); *Associated Press v. N.L.R.B., supra,* 492 F.2d at 664-666, approving deferral in 199 NLRB 1110 (violations of Section 8(b)(2) and (1)(A) and 8(a)(3), (2), and (1) alleged).

Where conformance with *Spielberg* appears reasonably likely, the Board concluded that "the purposes of the Act are well served by encouraging the parties . . . to resolve their disputes without government intervention" (80 LRRM at 1723).[31] For "the relationship of the contracting parties is strengthened by mutual reliance on contract procedures" and the "intervention of this Board, by contrast, can sometimes be an unsettling force" (*ibid.*).[32] Moreover, the union can be expected to provide effective representation for employee grievants allegedly disciplined for union activity (*id.* at 1723-1724), and the Board's retention of jurisdiction guards against procedural unfairness or statutory repugnancy under the *Spielberg* standards.

Here, as in *Collyer* and *National Radio,* the contract procedure offers a fair and quick means for resolving the disputes presented and there is

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[31] The decision to defer in *National Radio* was based on statutory policies "[w]holly apart from considerations arising from the increasing caseload before [the] five-member Board" (80 LRRM at 1723). Nonetheless, the Board noted that coping with its caseload is a significant problem, citing statistics showing that it decided 836 contested unfair labor practice cases in fiscal 1971 – an increase of more than 500 percent since 1957 (*id.* at 1723 n. 12). A more recent press release indicates that in fiscal 1974, the number of Board decisions in contested unfair labor practice cases rose to a new high of 977 (*infra,* S.A. 2). See *Associated Press v. N.L.R.B.*, *supra,* 492 F.2d at 668: "Even where, as here, neither party has attempted to invoke . . . arbitration . . . , the Board does not abuse its discretion by suggesting that they do so in order to resolve the disputes without governmental intervention and expenditure of Board and judicial resources," in accordance with the statutory policies.

[32] In this connection, the Board quoted with approval the observations of the Fifth Circuit in *Sinclair Refining Co. v. N.L.R.B.*, 306 F.2d 569, 579 (1962), on the effect of Board intervention on the arbitral resolution of disputes under the contract (80 LRRM at 1723 n. 13):

> The whole controversy then shifts from the plant to the nearest Board hearing room, and thereafter to the nation's capital, and then on to the seat of any one of the eleven Courts of Appeals having jurisdiction over the employer. Whatever else that is, it is not giving full play to the means established by the parties. More than lost time, it introduces or magnifies advocative hostility.

a sufficient likelihood that the resolution will conform to *Spielberg* standards to justify a temporary withholding of Board processes. As shown, the contracts authorized discipline for just cause and proscribed discrimination against employees because they engaged in activities protected by the Act (*supra,* pp. 7-8, n. 6). Any grievance concerning a discharge or disciplinary suspension was subject to mandatory, binding arbitration (*ibid.*). The two discriminatory suspensions alleged here were unquestionably subject to arbitration under these procedures – and, indeed, one of them was successfully processed through arbitration (*supra,* p. 10).[33] Similarly, the miscellaneous incidents alleged to violate Section 8(a)(1) could be raised under the purpose, recognition, and non-discrimination clauses of the contracts (pp. 5, 7, n. 3, n. 5).[34] As the Board found, these alleged acts of harassment and discrimination could also be resolved through the parties' grievance procedure (A. 846).[35]

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[33] The Union errs in suggesting that the Company discriminated against employees by suspending them "for demanding representation in the course of a disciplinary interview" (Br. 39, 41). There was no claim that Shop Steward Raymond or employee Sullivan was suspended for demanding union representation (*supra,* pp. 7-11). The Union's reference is apparently to the part-day suspension of employee Urbanowicz in 1969. But it is conceded that Urbanowicz was suspended for refusing to sign an attendance report, not for requesting representation (A. 498, *supra,* pp. 13-14). And the complaint alleged that the refusal to summon a shop steward for Urbanowicz on this occasion violated the Company's bargaining obligation under Section 8(a)(5) and (1) of the Act, not that it constituted discrimination under Section 8(a)(3) and (1) (A. 502, 456). Like Sullivan, Urbanowicz received an arbitral award directing the reimbursement of any pay lost during the suspension some time before the Administrative Law Judge issued his decision in this case (*supra,* p. 14).

[34] The non-discrimination clause proscribed "restraint or coercion" because of union membership as well as discrimination for engaging in protected activities (pp. 5, 7, n. 3, n. 5).

[35] Contrary to the Union's contentions (Br. 39), all matters alleged here appear to be "arbitrable" grievances." Most are subject to mandatory arbitration on the request of either party; some require the consent of both parties for arbitration (A. 846, n. 5; *supra,* pp. 5, 7-8, 11-13, 15-16, nn. 3, 5, 6, 11, 12, 13, 14, 15, 16 and 17). This Court in *Nabisco, Inc. v. N.L.R.B.,* 479 F.2d at 773, rejected the contention that "the Board should defer only when the dispute settlement technique adopted

(Continued)

The Union argues (Br. 38-39, 50, 54, 57) that the Board improperly deferred here because the record demonstrates a pattern of widespread antiunion activity and repudiation of the principle of collective bargaining that might be missed in piecemeal arbitration. One answer is that the Board has looked at the record as a whole and sees no such pattern. Thus, as noted, the Board did "not find that the number and nature of these instances of alleged misconduct reflect a pattern of continuation of prior unfair labor practices" (A. 845), like those involved in *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d 85, 99-100 (C.A. 2, 1971) (the *"Weil-Peterson"* case).[36] Rather, the Board found the clashes

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[35] (Continued) by the parties involves mandatory arbitration." Moreover, as the Board noted, "to the extent that there may be some question as to the arbitrability of some items," there is certainly sufficient basis in the contract for finding coverage to justify submitting the dispute to arbitration (A. 846, n. 5). See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974), 94 S. Ct. 629, 639 n. 10; 38 L.Ed. 2d 583, 593 n. 10; *United Aircraft Corp. v. Canel Lodge No. 700, supra*, 314 F. Supp. 371, 376-377 and cases there cited, aff'd 436 F.2d at 3, cert. denied, 402 U.S. 908.

[36] The Union notes (Br. 48) that the Board stated in *National Radio:* "We believe this case must be distinguished from those in which a history of . . . [union] animus or pattern of action subversive of Section 7 has been alleged," citing *United Aircraft Corp., supra,* 188 NLRB 633 (the *"Sherman"* case), preceded by the signal "Compare" (80 LRRM at 1724 n. 16). In *Sherman,* the Board relied on the pattern of discrimination established in the *Weil-Peterson* case, *supra,* in finding on the merits that the Company had discriminatorily suspended Union Steward Tobin, in violation of Section 8(a)(3) and (1). Since *Sherman* was decided before *Collyer,* it is not surprising that the Board denied the Company's motion to defer a decision on the merits pending arbitration (*supra,* p. 10 n. 9). Member Brown, who had long favored adoption of a pre-award deferral policy, nonetheless concurred in the denial of the Company's motion in *Sherman* because of the posture of the *Weil-Peterson* case, which was then pending in this Court (188 NLRB at 633 n. 1). Whatever else the citation of *Sherman* in *National Radio* may mean, it is clear that it did not represent a guarantee that a pre-award deferral policy would never in any circumstances be applied to the Company. Compare Un. Br. 48-49, 32, n. 36. And just as the Board was not required to view the Company's past unfair labor practices as a foreclosure of deferral for all time, so it was not compelled to vitiate its deferral here, upon the Union's motion for reconsideration, because of the General Counsel's allegations of subsequent violations in Board Case No. 1-CA-7890 *et al.* (Un. Br. 27-29). The complaint in that

(Continued)

between supervisors and employees here analogous to the "innumerable individual disputes which are likely to arise in the day-to-day relationship of the parties," in plants of this size (A. 846, 844-845). Some of the incidents might support unfair labor practice findings, others might not; but all would initially appear to be suitable for resolution through the grievance and arbitration procedure.

The Board's judgment is a reasonable one. Thus, the 8(a)(3) violations alleged here concern the 2-week suspension of a shop steward who used abusive language to his foreman and knocked a pencil out of his hand (*supra*, p. 7), and the 3-day suspension of an employee who was engaged in passing out merit ratings of other employees for a brief period after the start of work (*supra*, p. 9). Many of the alleged 8(a)(1) violations, which the Administrative Law Judge would have dismissed on the merits, involved supervisors' reprimanding employees for asserted work derelictions, talking on the job, or otherwise wasting time (A. 797-800, 801-802, 805). Whether justified or not, the requirement that Shop Stewards Gaskins and Havener secure passes from their foremen when they need to carry their union briefcases out of the plant would scarcely appear to constitute a devastating blow to union activity. Plant security regulations required such passes (*supra*, p. 7 n. 5); the Company's Industrial Relations Director testified that thousands of passes were issued in 1970, of which a small proportion were for union materials (A. 357); numerous passes were issued to Gaskins and Havener for their briefcases

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[36] (Continued) case is pending before the Board on the Company's motion for summary judgment – *i.e.*, for deferral pursuant to *Collyer*. [After the filing of typewritten briefs in this case, the Board granted the Company's motion for summary judgment in Board Case No. 1–CA–7890 *et al.* The Board's decision and order in that case (213 NLRB No. 22) is pending before the Court on the Union's petition to review in No. 74-2211].

(*supra*, p. 7 n. 5); and they, like other employees, were furnished a locker in which to store personal articles within the plant (*ibid.*).[37] Other alleged 8(a)(1) violations are comparably marginal.[38]

The history of the litigation in this case illustrates the soundness of the court's observation in *Associated Press v. N.L.R.B.*, *supra*, 492 F.2d at 688 that, "[a]bsent the doctrine [of pre-award deferral], parties would be encouraged to circumvent grievance and arbitration procedures for which they had contracted whenever they felt they had a better chance for favorable resolution by quickly filing an unfair labor practice charge

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[37] The Administrative Law Judge found that the pass requirement had been orally waived by Personnel Director Colby (A. 800 n. 8). The Company protested this finding on the grounds that it was inadequately supported in the record and that, in any event, Colby had no authority to make such a waiver (Co. Br. to Bd. 53-55, n. 37). On the face of it, this would appear to be an issue appropriate for resolution by an arbitrator familiar with the law of the shop and the bargaining relation of the parties.

[38] For example, the violations that the Administrative Law Judge would have sustained were:

1. A newly elected shop steward was warned of harsher application of work rules; the next day his foreman told him that he had not meant to threaten him by these remarks and he could forget them (A. 804).
2. A shop steward was not afforded equally the same privilege other employees had of engaging in short nonwork-related conversations if they did not abuse the privilege (A. 800).
3. Shop Steward Raymond told plant security investigators that he would like a steward present during the interview over his fight with Foreman Heim but he would not press the issue because he knew that another employee's job had been threatened for insisting on a union steward and that the charges against him were serious; the investigators failed to reassure Raymond that no reprisal would follow if he insisted on representation (A. 803; 201).
4. In interviewing former union officer Sullivan about his distribution of merit ratings after work had started, Plant Security Officer Porter asked Sullivan if he was still active in the Union and, if not, how he happened to have other employees' merit ratings in his possession (A. 804-805).

before the Board." Thus, prior to *Collyer*, the Board's longstanding policy of post-award deferral under *Spielberg* provided an incentive for each party to have the case heard first in the forum of its choice and to defer any hearing in the least favored forum. The Union sought to invoke Board jurisdiction in preference to arbitration; the Company sought the converse (*supra*, pp. 7-8, 9-10 and n. 9). In Sullivan's case, the Company secured a court order compelling the Union to submit the grievance to arbitration and the Union was unsuccessful in persuading the arbitrator to defer (*supra*, pp. 9-10). The result was that Sullivan secured a remedy for his suspension from the arbitrator 7 months before the Administrative Law Judge issued his decision in this case, despite the Union's efforts to postpone arbitration (*supra*, p. 10).

By contrast, the Company-filed grievance over Raymond's suspension never got to arbitration because the unfair labor practice hearing occurred first, the Administrative Law Judge refused to defer, and the Company thereafter agreed with the Union to withdraw its request for arbitration (*supra*, p. 8). See also the history of *United Aircraft Corp.*, 188 NLRB 633 (1971) (the *"Sherman"* case), *supra*, p. 10, n. 9. In short, the lack of a pre-award corollary to post-award deferral tends to inhibit resort to the contract procedures, to delay remedial relief for employee grievants, and to foster prolonged discord between the parties.

From the Union's perspective, what is needed here is a court-enforced Board order, followed by contempt proceedings for any future violations (Un. Br. 58). However, the Board could reasonably conclude that its pre-*Collyer* policies have not been overwhelmingly successful in promoting industrial peace between these parties in the past and that a new approach is warranted. Moreover, the Board's decision by no means forecloses the Union's remedies. As noted, the Board has retained jurisdiction in case the Company refuses to cooperate in the prompt resolution of disputes under the contract or the contract procedures prove unfair or reach a result repugnant to the Act. There are now outstanding decrees against the Company based on previous Board orders. If future acts provide clear

and convincing evidence that those decrees have been violated, contempt proceedings may be instituted. Arbitrators have flexible remedial powers (*United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960)); their awards may be enforced in the courts (*id.* at 596 n. 1); and the courts have inherent authority to enforce compliance with their lawful orders through civil contempt (*Shillitani v. U.S.*, 384 U.S. 364, 370 (1966)). Finally, in the event that a pattern of Company disregard for employee rights is established in arbitration proceedings, the Union is free to present that evidence as background in seeking to invoke Board processes or the institution of contempt proceedings for any future violations of previously enforced Board orders.

2. The alleged Section 8(a)(5) and (1) violations were properly deferred

As the Board found (A. 845), the Company's alleged failures to provide adequate notice of layoffs, furnish information relevant to merit rating grievances, and summon stewards and discuss employee grievances under the contract procedure "are clearly matters of contract interpretation uniquely within the province of the arbitrator's skills." The contracts provided that "[e]xcept in an emergency or for reasons over which the company has no control, where there are general layoffs for an indefinite period, as much notice as practicable shall be given in writing to the [union] shop committee before the layoff" (*supra*, p. 12 n. 12). Step 2 of the grievance procedure provided that the Company "will produce such pertinent existing production, payroll, attendance records, and disciplinary notices pertaining to the employee involved as may be necessary to the settlement of a grievance at this step of the grievance procedure" (*supra*, p. 16 n. 16). Step 1 provided that an "employee having . . . a grievance or complaint may, after notice to his immediate supervisor, take it up either directly with his foreman or with the shop steward who shall take it up with the employee's foreman" (*supra*, pp. 13, 16 n. 13, n. 17). The contract grievance procedure further specified that an "employee who has been discharged or given a disciplinary suspension, shall before leaving

the plant be permitted to see the shop steward for the area in which he worked at a location designated by the company if he requests this privilege of his foreman" (*supra*, p. 13, n. 14).[39]

All the above provisions are subject to mandatory, binding arbitration upon the request of either party (*supra*, pp. 12, 13, 16 n. 12, n. 16, and n. 14). In every instance, arbitration could effectively resolve the issue between the parties. Thus, if an arbitrator determined that the Company had refused to produce records it was required to produce under the grievance procedure, the Union's right of access to such data would have been established. Conversely, if the arbitrator determined that the contract waived the right to the records at Step 1 and that the Company had produced all records required at Step 2, that determination would be dispositive of the Union's claim before the Board if it conformed to the Board's standards for post-award deferral under *Spielberg*. Arbitral decisions on whether the Company provided adequate notice of layoffs under the contract (*supra*, pp. 11-12) and whether it summoned stewards and discussed grievances with them in accordance with the contract grievance procedure (*supra*, pp. 12-14, 16-17) would be similarly dispositive if *Spielberg* standards were met.

The Union (Br. 42) argues that it is inappropriate for the Board to defer the information issues to arbitration since a contractual waiver of the statutory right to such information must be in "clear and unmistakable language." But, as the Board has recently observed, the "clear and unequivocal" rubic does not necessarily provide an instant or self-evident answer to the question whether there has been a waiver of statutory rights in a given case. *Valley Ford Sales*, 211 NLRB No. 129 (1974), 86 LRRM 1407, 1408-1409; *Radioear Corp.*, 199 NLRB 1161 (1972).

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[39] The Company's failure to comply with this provision when it suspended employee Urbanowicz was the basis for the arbitrator's award directing that she be made whole for any losses suffered as a result of being denied the services of a steward, including reimbursement of any pay lost during her part-day suspension in 1969.

Considerable analysis of the contract, the bargaining history, and the practice of the parties under the contract may be required. *Valley Ford Sales, supra,* 86 LRRM at 1408 and cases there cited. See also *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d at 95-96;[40] *N.L.R.B. v. Perkins Machine Co.*, 326 F.2d 488, 489 (C.A. 1, 1964). Accordingly, the Board does not abuse its discretion in deferring the dispute to the special skills of an arbitrator in the first instance. The Union would still be free to challenge the arbitrator's decision as repugnant to the Act under *Spielberg* and to secure judicial review of any adverse Board ruling on its claim. Compare *Radio Television Technical School, supra,* 488 F.2d at 461 with *Valley Ford Sales, supra,* 86 LRRM at 1408-1409.

The Union errs in suggesting (Br. 41-42) that the holding in the present case conflicts with *American Standard, Inc.*, 203 NLRB No. 169 (1973), 83 LRRM 1245, 1246, where deferral was deemed inappropriate because there was "no contract clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the Union waives its statutory right to such information." See also *Acme Industrial Co.*, 150 NLRB 1463, 1465 (1965), enfmt. denied, 351 F.2d 258, 260-261 (C.A. 7, 1965), rev'd and rem'd, 385 U.S. 432.[41] Here there is "a contract clause dealing

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[40] Compare the Administrative Law Judge's findings of Union acquiescence in the Company's notice procedure with respect to layoffs, *supra,* p. 11.

[41] In *Acme, supra,* 385 U.S. at 435, the Board found that the information requested by the union was necessary to the intelligent evaluation of grievances and that the contract contained no clause by which the union waived its statutory right to such information. The court of appeals did not question the relevance of the information or the finding that the union had not expressly waived its right to the information. Nonetheless, the court ruled that the existence of a provision for binding arbitration of differences concerning the meaning and application of the contract ousted the Board of jurisdiction. The Supreme Court reversed, reaffirming that the Board's *power* to prevent unfair labor practices under Section 10(a) of the Act is not affected by any other means of adjustment that may exist (385 U.S. at 437). As the Board noted in the present case, "a careful reading of the Court's opinion indicates that the Court was not thereby suggesting that the Board would be precluded

(Continued)

specifically with the furnishing of information necessary and relevant to the processing of grievances" at Step 2, as well as a claim of waiver with respect to the furnishing of such information at Step 1.

The Union (Br. 44-45) argues that deferral in these circumstances prejudices employees seeking timely information bearing on their merit rating grievances since they will be required to go through the contract procedure twice: first to get the information, and then to press their grievances on the merits.[42] But once a disagreement has arisen between the parties on the right to particular records for use in the grievance procedure, some delay inevitably occurs while the issue is being resolved. Nothing in the history of this litigation suggests that the Board is a more expeditious forum than the parties' own contract procedure for deciding such questions or that the Company would not comply with an arbitral decision on what kinds of records must be produced at a given stage in the grievance procedure. Indeed, it seems likely that the respective rights and obligations of the parties under the contract would have long since been settled had the Union promptly processed grievances over the issue to mandatory arbitration.

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41 (Continued) from withholding its processes . . . where, as here, the contract makes available a quick and fair means for the resolution of the dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred" (A. 846, n. 4). The Union's reliance (Br. 42-43, A. 1-7) on the General Counsel's "Arbitration Deferral Policy Under *Collyer* – Revised Guidelines" is misplaced. As the General Counsel emphasized in the introduction to these guidelines, they "are, in part, generalizations derived from the Board's published decisions and, in part, procedures for the application of the *Collyer* policy which will be presented for the Board's consideration and adoption or rejection on a case-by-case basis . . . " (Un. Br. A. 3).

42 As noted, *supra,* p. 14, the form merit rating grievance used by many grievants here made a two-pronged request for relief. Thus, it challenged the foreman's rating and requested: (1) that "my foreman produce and turn over to the Steward and myself copies of all standards and records that he relied upon in making the above rating," and (2) that "I be rerated" at a higher level. The form grievance appears to contemplate a single proceeding, in which the grievant would first secure relevant records and then would urge that the records showed he should be rerated.

Finally, the record does not support the Union's effort to establish that deferral is inappropriate here because the Company destroyed the efficacy of the contract dispute-resolving machinery and thus made resort to those procedures futile (Un. Br. 19-27).[43] For example, the Union asserts that the Company refused, "as a matter of policy, to change its position as a result of grievance meetings at steps 2 and 3 at all and at step 1, except in a meeting wherein no union representative participated" (Un. Br. 19, 24). No such allegation was made in the complaint (A. 446-458, 479-483, 500-504), no such finding was made by the Administrative Law Judge, and no exception was taken to the failure to make such a finding (A. 826-839).

Similarly, the Union attempts to establish a Company policy of refusing to summon stewards or to provide for the discussion of employee grievances between foremen and stewards at Step 1 (Br. 19-24). Instances of such alleged misconduct are discussed in the Counterstatement, *supra*.[44]

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[43] See *Collyer, supra,* 192 NLRB at 845-846 (concurring opinion of Member Brown): "Deferral, of course, would not encourage bargaining where the very process of bargaining, including grievance arbitration, has been repudiated and is, in effect, nonexistent." See also *Joseph T. Ryerson Sons, Inc.*, 199 NLRB No. 44 (1972), 81 LRRM 1261, 1263; *North Shore Publishing Co.*, 206 NLRB No. 7 (1973), 84 LRRM 1165, 1167; cf. *U.S. Postal Service,* 210 NLRB No. 95 (1974), 86 LRRM 1222-1223.

[44] Instances in which the Company is alleged to have failed to summon stewards for the discussion of employee grievances are: (1) the failure to call a steward for employee Rogers, which occasioned a grievance that was not pressed to arbitration (*supra*, p. 12, n. 13); (2) the refusal to call a steward following the suspension of employee Avery; when Avery filed a grievance over the refusal, the Company promptly rescinded the suspension and asked if Avery still wanted a steward (*supra,* p. 13); and (3) the refusal to summon a steward for employee Urbanowicz, which resulted in an arbitral award remedying the refusal (*supra,* pp. 13-14). Alleged failures to provide for the discussion of employee grievances include: (1) Foreman Bankowski's refusal to discuss an employee's merit rating grievance with the steward because he thought the employee should have spoken to him first and that the steward didn't know anything about the work (*supra,* pp. 16-17); (2) the insistence that merit rating grievances must be discussed with the employees' current supervisor, Assistant Foreman Zielinski, rather than with the various foremen who had previously rated the employees (*supra,* p. 17); and (3) Foreman Rodenbaugh's referral of a steward

(Continued)

Rather than a pattern of frustration of the grievance process, these instances reveal individual disagreements on how that process was to function – *i.e.*, at what point stewards were to be summoned during working hours, which supervisors were to discuss merit ratings with the steward, and whether the foreman was required to discuss an employee's grievance with the steward before the employee had discussed it with the foreman.

The Company proffered evidence that of over 3,000 requests for steward representation at the plants between January 1969 and May 1971, there were only 24 grievances filed over the refusal to call the steward as requested (A. 717-718, 347-351). Moreover, the Union cites no evidence that the Company sought to prevent employees from filing, or the Union from processing, grievances over the failure to call stewards, discuss grievances, or furnish merit rating information. Such grievances were filed in this case and the only one that was pressed for mandatory arbitration (that of employee Urbanowicz) resulted in a favorable arbitral award with which the Company fully complied. Accordingly, the Board did not abuse its discretion in determining "to proceed on the assumption that the procedures which have been shown to work well can and will work effectively again to resolve the disputes here" (A. 847). For there is at least a "sufficient promise of such a result to justify a temporary withholding of . . . [Board] processes . . . to give the parties an opportunity to make their own machinery work" (A. 847-848).

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44 (Continued) to Assistant Foreman Terabasi for discussion of a merit rating grievance since Terabasi had made the rating, followed by Rodenbaugh's subsequent overruling of the tentative decision to rerate the employee (*supra*, p. 17, n. 18).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition to review should be denied.

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SUPPLEMENTAL APPENDIX

The Supplemental Appendix, which follows, consists of a press release of the National Labor Relations Board, issued on July 1, 1974, and the opinion and award of Arbitrator Charles O. Gregory, issued on May 7, 1970 (General Counsel's Exhibit 7(a)).

S.A. 2

NATIONAL LABOR RELATIONS BOARD
PRESS RELEASE

IMMEDIATE RELEASE (R-1344)
Monday, July 1, 1974 Tel. 254-9033

NLRB ISSUES RECORD NUMBER OF DECISIONS

The National Labor Relations Board broke all records during fiscal 1974 in deciding cases under the nation's primary labor relations law.

In the busiest year of its history in administering the National Labor Relations Act, the NLRB issued a record number of decisions in the fiscal period that ended last midnight.

The five-Member Board handed down 977 decisions in contested unfair labor practice cases brought before it by individuals, employers, and unions. Additionally there were 543 rulings by the Board in employee representation election cases. Each total was a record, and the combined figure was 100 decisions more than the previous mark of 1,420 decisions in unfair labor practice and representation cases set last year.

The Board is composed of Chairman Edward B. Miller, and Members John H. Fanning, Howard Jenkins, Jr., Ralph E. Kennedy, and John A. Penello.

"We continue to be faced with a growing caseload," said Chairman Miller. "We have somehow managed to keep pace with it. This five-man Board, aided by staffs which have had almost no increases in personnel since I became Chairman four years ago, has coped with an approximate 25% rise in cases over that period. I am, frankly, surprised that we have been able to cope this well, and I have genuine doubts we can do it much longer without Congressional action to modernize our almost 40-year-old, antiquated, decision-making structure."

The NLRB, in enforcing the nation's principal law governing union-employer relations, does not initiate cases. It processes cases filed with it.

The 977 Board decisions in contested unfair labor practice proceedings compared with 963 rulings a year earlier. The 543 rulings in cases where the NLRB was petitioned to conduct secret-ballot employee elections were 86 more than in fiscal 1973.

GENERAL COUNSEL'S EXHIBIT 7(a)

Arbitration between

Canel Lodge #700, International Association of Machinists and Aerospace Workers, AFL-CIO	)	**Subject**
and	)	Suspension Grievance of Michele Urbanowicz
United Aircraft Corporation, Pratt & Whitney Aircraft Division, Middletown, Connecticut	)	

STATEMENT

The grievant, Michele Urbanowicz, is a crib attendant who, at the time in question, worked on the third shift (12:01 A.M. – 7 A.M.) in Department 4042 at the Company's plant in Middletown. She had previously been requested to work week-ends; and while she frequently accepted such assignments, she sometimes declined. Finally she gave formal notice that she did not want to work on Sundays. Her reason for this was that she was young and single and liked to go out Saturday nights; and having to report for Sunday work just before midnight on Saturday interfered with her social life. She testified that if the whole department were scheduled to work Sunday, she felt she would be expected to work then also; and she seems to have recognized and conceded an obligation to work on Sundays at such times, as well as in emergencies, when nobody else would be available if she did not agree to come in.

At any rate, on Thursday, July 17, 1969 Mr. Costa, her Group Supervisor, asked Miss Urbanowicz to work Sunday, July 20 in Department 4825, apparently as crib attendant. Perhaps it would be more accurate to say that Costa told her she was scheduled to work on that

Sunday. She said that she could not work then—that she had other plans which would prevent her from working then. Costa told her that she was scheduled to work then, anyhow; and when she persisted in declining to work then, Costa turned the matter over to Mr. Poppalardo, her foreman, who asked the grievant if she was going to work Sunday, July 20, as she was scheduled to do. When she said No, he told her that she was scheduled to work anyway on Sunday, July 20. She explained that she could not come in then, and why; but Poppalardo persisted. She said she would change her plans if she could work Saturday, also; but Poppalardo said that all the Saturday spots were filled and that no Saturday work was available for her. From then, on, the transcript is somewhat hazy about what occurred. Miss Urbanowicz asked Poppalardo what she should do if she did not come in Saturday night for the Sunday shift in question; and he certainly gave her an ambiguous and evasive answer, implying both that he did not know and that she already knew the procedure to follow. As to this, it would seem relevant, perhaps, to discover whether her question as to what to do was founded on the supposition that she was scheduled to come in, and recognized it, or on the supposition that she had already made it clear to Poppalardo that she was *not* coming in, so that a call in under such circumstances would appear to be redundant and unnecessary. From the entire record it is not easy to tell just how things were left at this interview on Thursday, July 17 between Poppalardo and Miss Urbanowicz. Poppalardo said he ended the interview on the understanding that she was scheduled to work on Sunday, July 20 and therefore was expected to come in then. Miss Urbanowicz said that she understood what Poppalardo said, all right, but that it was her firm understanding that she had made it clear to Poppalardo that she was *not* coming in on Sunday and that therefore he had no reasonable expectation that she would report for work on that day, so that there was

no necessity, under the circumstances, for her to call in on Saturday night if she did not then come to work. And it was with respect to these circumstances that she understood Poppalardo's remark as to not knowing what she should do Saturday night if she did not come to work on Sunday. I might add at this point that it transpired during the hearing from testimony given by Poppalardo that somebody other than Miss Urbanowicz could have been secured to fill the job she had been asked to fill on Sunday, July 20, so that there was no emergency in the sense that the job could not have been filled unless she came in to fill it on Sunday, July 20. As it was, of course, the job could have been filled ahead of time, since Poppalardo had knowledge ahead of time that Miss Urbanowicz was not going to work on Sunday, July 20.

Anyhow, as she had said in advance would be the case, the grievant did not report for work on Sunday, July 20; nor did she call in by telephone on Saturday night that she was not going to work on Sunday, since (as she testified) she had already told them this in advance. On Monday, July 21, I gather that Poppalardo learned through two telephone calls to her that the grievant had neither reported to work on Sunday, July 20 nor had called in to say that she would not then be working. (With respect to the events that followed, there seems to be some misunderstanding on the part of some of the witnesses as to dates; but I have here fixed upon the time sequence as I believe it must have occurred.) On Tuesday, July 22, toward the end of the shift, P brought the attendance book and asked Miss Urbanowicz to sign it opposite the date July 20, 1969 and the entry "AWOL – No Call." As she considered this entry to be false, she refused to sign it. Poppalardo was called away at this time and did not return before the shift ended. In the meantime, perhaps I should say that Miss Urbanowicz had casually asked two minor local officials – "little pawns or something," as she later described them,

and not shop stewards – whether or not she should sign the attendance book if she was asked to do so and they advised her not to do so. Poppalardo returned to Miss Urbanowicz with the attendance book at the beginning of the Wednesday, July 23 shift and asked her to sign it opposite the entry of July 20, 1969, AWOL – No Call; and again she refused to sign it because she regarded it as false, since she had not been AWOL at all and had had no obligation to call in under the circumstances. Poppalardo then said that if she was not going to sign the book, she must clock out and go home. And he told her she could not return to work until she first signed the attendance book as AWOL – No Call, for July 20, 1969. She requested to have a shop steward to advise her; and Poppalardo said that she could not have a steward in the plant until she first signed the book, but that if she persisted in refusing to sign the book, she could have the services of a shop steward at the guard house as she was leaving the plant premises. Again we have a hazy area with respect to what she requested and what happened. When she asked to communicate with her rider, Frank Ziemba, Poppalardo said he would take care of that by telephoning Ziemba's foreman; and he did so, either at the guard house or on the way there. At the guard house he left Miss Urbanowicz outside and telephoned somebody named Deag, apparently in personnel, to have a steward sent to the guard house for Miss Urbanowicz to consult. Here again the testimony becomes hazy. Poppalardo said that after he had arranged to have a steward come to the guard house, he went out to tell Miss Urbanowicz and she had gone – he said he could see the lights of her car disappearing – so he called back and cancelled the arrangement about the steward. Miss Urbanowicz, on the other hand, testified that she was waiting for the shop steward while Poppalardo was telephoning inside the guard house, and that after he telephoned Poppalardo came to the door of the guard house and told her "OK, you can go now," and so she went without having gotten to

consult a steward. On the basis of this conflicting testimony my finding is that although she had asked for a steward and was given reason by Poppalardo to suppose that she would see one at the guard house, Poppalardo did not produce a steward for her at that time as he had told her he would and, in effect, sent her home without having done so. Be that as it may, at 7:00 A.M. on Wednesday, July 23, Miss Urbanowicz came for Frank Ziemba, her rider, and they both went to the Union hall, where Mr. Nellis, the Local Business Agent, advised her to report for her next shift, sign the attendance book and return to work, in the meantime signing and filing the grievance which he thereupon drew up for her and which is Joint Exhibit B, the grievance underlying this case. So on Thursday, July 24 Miss Urbanowicz reported for work, and Poppalardo was there with the attendance book, which she signed opposite the entry July 20, 1969, AWOL, No Call.

This brings us to Miss Urbanowicz's grievance, which reads as follows:

> "I grieve that I have been suspended from work on Wednesday, July 23, 1969 without just cause, and refused a shop steward as a result of this action.
>
> "I request that I be made whole for any and all losses suffered as a result of this action."

This grievance remaining unsettled, the Union requested arbitration. A hearing was held on January 21, 1970 in Wethersfield, Connecticut before Charles O. Gregory, arbitrator. The Union's case was presented by Mozart G. Ratner, its attorney, of Washington, D.C.; and the Company's case was presented by William H. McLaughlin, its Industrial Relations Administrator, of East Hartford, Connecticut. A transcript was taken of the proceedings, several witnesses testified, and a number of exhibits were submitted. Each party filed a post-hearing brief.

Before the hearing got under way on the merits of the grievance, there was considerable discussion as to the exact nature and extent of the issue before me. While the Company's position was that the only issue was whether or not the grievant had been suspended for just cause– specifically, whether or not the Company had violated the agreement when it suspended the grievant after she refused to sign the attendance book– the Union's position was that there was an additional issue – that the grievant had been denied the services of a steward when she was suspended. The Company insisted that this issue concerning the steward was not arbitrable, pointing to the letter from Anthony P. Salustro of the Union to N. B. Morse of the Company dated October 6, 1969, the substance of which reads as follows:

> "In as much as no agreement could be reached at the fourth step meeting held on Tuesday, September 30, 1969 the Union requests that the following grievance be submitted to arbitration in accordance with Article VII, Section 3 (a, 1).
>
> "1. Suspension grievance of Michele Urbanowicz, Clock No. 202460."

Apparently the Company's position on this is that Mr. Salustro pinpointed the arbitration to Article VII, Section 3(a)1 which reads: "A grievance concerning the discharge or disciplinary suspension of an employee."

Also the Company points to the letter from William H. Nellis, Business Representative of the Local Union, to me, dated December 19, 1969, the first paragraph of which reads as follows:

> "This is to advise that the proper officials of the Pratt & Whitney Division of United Aircraft Corporation, East Hartford, Connecticut and Canel Lodge 700 IAMAW have agreed to place before you in arbitration the suspension

> grievance of Michele Urbanowicz, Clock No. 202460 in concurrence with the applicable provision of the current agreement between the Union and the Company."

Before I proceed I must therefore make a preliminary ruling on whether or not that part of the grievance relating to the refusal of a shop steward is arbitrable at this time. I think it is clear from these letters that the Union requested arbitration of the grievance; and part of the grievance relates to the alleged refusal of the Company to get a shop steward at the time of the suspension to assist the grievant. In my opinion Article VII, Section 3 (a) 1 is broad enough to encompass, as a matter of notice pleading, anything related to a discharge or suspension that is set forth in the grievance itself. I note that in Article VII, Section 3 (a) 30, one of the matters the parties have agreed are arbitrable is a violation of Article VII, Section 10, the last sentence of which reads:

> "An employee who has been discharged or given a disciplinary suspension, shall before leaving the plant be permitted to see the shop steward for the area in which he worked at a location designated by the Company if he requests this privilege of his foreman."

I think that the reference to Article VII, Section 3 (a) 1 by Mr. Salustro and to the grievance by Mr. Nellis sufficiently put the Company on notice that the Union wanted to arbitrate what was in the grievance. Also I think a fair construction of Article VII, Section 3 (a) 1 is that it would embrace any other item listed under such Section 3 (a) that is relevant to the suspension and is specifically mentioned in the grievance itself, which grievance performs the function of what would in an action at law be called the complaint. At any rate, I do not think the Company has been taken by surprise with respect to that part of the Union's proposed issue relating to refusal of a steward; and I rule that that part of the Union's proposed issue covering refusal of the shop

steward's services is arbitrable. I take it, therefore, that the issue in this arbitration is two-fold: Whether or not Miss Urbanowicz's suspension was for just cause and whether or not she was denied the services of a shop steward, the remedy requested being the same in either event.

This is an extremely disturbing case. Mr. Hall testified for the Company that in his opinion the Company may schedule employees for overtime work – apparently at any time – and expect them to report to work as scheduled and to call in if, shortly before the time to report, they are unable so to report. This seems not to be a matter covered in the agreement. If it is, the parties did not mention it to me. Mr. Poppalardo, on the other hand, in his testimony on cross-examination, virtually equates scheduling overtime (at least for Sundays) with a request that an employee work such Sunday overtime, conceding that if the employee does not want to work Sunday overtime, he may decline the request and would then not be scheduled. I think that for the purposes of this case I will accept Poppalardo's statement, because he was the Company representative who dealt directly with Miss Urbanowicz at the time in question. So, with respect to what happened on July 17 between Poppalardo and Miss Urbanowicz, it boils down to whether she refused the request to work Sunday, July 20 or not. Poppalardo says that the final understanding was that Miss Urbanowicz was scheduled to work on Sunday, July 20. She says that the final understanding was that she had declined to work on Sunday, July 20 and that although she had been scheduled to work on that day by Poppalardo, she became "unscheduled," so to speak, by her express refusal to accept the assignment. The testimony here is somewhat confusing; but I think that I will accept Miss Urbanowicz's version of what occurred. Therefore, according to the criterion set down in Poppalardo's own testimony on cross-examination, she appears to have been not "scheduled" to work on Sunday, July 20, 1969, (in the sense

that she had accepted the assignment), and hence it would seem to me that she had no obligation to call in if she did not report for work on that day. So the entry in the attendance book "AWOL – No Call" seems to me to have been incorrect.

But that does not dispose of whether or not there was just cause for the suspension itself. The Company's position is simply that Miss Urbanowicz should have signed the attendance book on Wednesday, July 23 when Poppalardo asked her to do so, apparently whether the entry for July 20, 1969 was correct or not, and then have filed her grievance – presumably by analogy to the "work now, grieve later" rule of thumb. Of course, Miss Urbanowicz at no time refused to work; and she was put in a most embarrassing position when she was required to sign what quite rightly seemed to her to be an incorrect entry. Indeed, taking everything into account, I think that on Thursday, July 17 and on Wednesday, July 23 she was treated with what I would call an almost complete lack of consideration. Somewhere in this situation – perhaps by a rough and somewhat far-fetched analogy to Dean Prosser's "new tort" – there might be found another exception to the rule of thumb "work now, grieve later," in addition to the presently recognized exception in situations involving personal danger to life and limb. But in view of the fact that experienced Union officials, such as Mr. Nellis in this case and shop steward Grenier in the Butts case, recognize the expediency, if not the duty, of the employee's signing the attendance book, even under these or similar circumstances, and then grieving, I prefer not to base my award on the theory that Miss Urbanowicz could refuse with impunity to sign the book in this case and that the Company, through Poppalardo, exceeded its rights in suspending her because of her refusal to sign the book, just because the entry in the book was incorrect and therefore hardly justified Poppalardo's insistence that she

sign the entry. I say this in spite of the fact that the seemingly incorrect entry in the attendance book was a substantial cause of this whole situation, without which it would not have occurred.

On the other hand, I think that Miss Urbanowicz was wrongfully denied the services of a steward at the guard house when she was being sent home from the plant after her suspension on Wednesday, July 23. I refrain from passing on whether or not she was wrongfully denied the services of a steward in the plant when she was about to be suspended and without first having signed the book, because it is not necessary for me to do so on the state of the record. Anyhow, the Company's position in this respect seems to be firmly based on past practice. But when Poppalardo told Miss Urbanowicz she could not see a steward in the plant until she signed the book, he assured her that if she wanted to, she could see a shop steward at the guard house on her way out. On the basis of this assurance, I think she expected to see a shop steward at that time and place and that she was waiting for Poppalardo to call one and for the shop steward to appear when Poppalardo told her that she could leave. I realize that there is ambiguous testimony in the transcript on this matter; but I think under the circumstances it was up to Poppalardo to see that a shop steward was produced at the guard house while Miss Urbanowicz was still there. She had certainly wanted to see a shop steward, she had made this desire amply clear, she was obviously in trouble, and I think that it was a matter of propriety, if not of duty, on Poppalardo's part to see that a shop steward was there. Also I think Poppalardo should have realized that Miss Urbanowicz was undergoing a considerable strain and might easily have been confused at what was happening. In any event, if a shop steward *had* appeared at the guard house while Miss Urbanowicz was there, he very likely would have advised her to return to her department, sign the attendance book and go

back to work, filing a grievance at her first opportunity. And I think it likely that she would have followed this advice at that time, if it had been given to her by a shop steward. Had this happened, then there is a good chance that this case would never have arisen at it did. Of course, we don't know that this would have happened; but since we also don't know that it would not have happened, then I am assuming that it would have happened had Poppalardo produced a shop steward at the guard house while Miss Urbanowicz was there. Since he did not, then I think Miss Urbanowicz should be reimbursed for the pay she lost in this whole transaction which, after all, was caused by the incorrect attendance book entry in the first place.

On the basis of the foregoing Statement, and on the entire record before me in this case, I conclude that Miss Urbanowicz unjustly suffered suspension for most of a shift on July 23, 1969 and that she should be made whole for any and all losses suffered by her as a result of this action.

AWARD

The grievance in this case is allowed in part, on the theory that the grievant, Michele Urbanowicz, was denied the services of a shop steward at the guard house on July 23, 1969; and the remedy shall be that she shall be made whole for any and all losses suffered by her as a result of this action – presumably the balance of any pay for Wednesday, July 23, 1969 which she has not already received.

/s/ Charles O. Gregory
Charles O. Gregory, Arbitrator

May 7, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LODGES 700, 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	
Petitioner,	)	
v.	)	No. 74-1035
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent,	)	
and	)	
UNITED AIRCRAFT CORPORATION,	)	
Intervenor.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief and supplemental appendix in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 20th day of March, 1975.